No. 15164

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY COMPANY, a Corporation, and E. F. GRANDY, INC., a Corporation, Appellants.

vs.

AMERICAN SEATING COMPANY, a Corporation, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —7-13-56

No. 15164

United States

Court of Appeals

for the Ninth Circuit

GLENS FALLS INDEMNITY COMPANY, a Corporation, and E. F. GRANDY, INC., a Corporation, Appellants.

vs.

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Appeal from the United States District Court for the Southern District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ALBERT LEE STEPHENS, JR., and
JOHN E. McCALL,

535 Rowan Building,
458 South Spring Street,
Los Angeles 13, California.

For Appellee:

BURNETT L. ESSEY and
IRVING H. GREEN,

121 South Beverly Drive,
Beverly Hills, California. [1*]

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* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 14305-T

AMERICAN SEATING COMPANY, a New Jersey Corporation,

Plaintiff and Respondent,

vs.

GLENS FALLS INDEMNITY COMPANY, a New York Corporation, et al.,

Defendants and Appellants,

ORDER EX PARTE NUNC PRO TUNC

Good cause appearing therefor;

It Is Hereby Ordered, Adjudged and Decreed that plaintiff's Exhibits 1, 9, 10 and 11, marked for identification, and each of them, be and the same hereby are received in evidence nunc pro tunc as of June 1, 1953.

Dated this 1st day of June, 1953.

/s/ ERNEST A. TOLIN,
Judge of the District Court

This order signed this 5th day of April, 1954, nunc pro tunc June 1, 1953, for the reason that by inadvertence the Exhibits were not received into evidence. The Court mis-remembered the events at

trial and failed to rule as it intended to do, that the Exhibits be received.

/s/ ERNEST A. TOLIN,
Judge [196]

[Endorsed]: Filed April 5, 1954.

[Title of District Court and Cause.]

NOTICE

You are hereby notified that nunc pro tunc order amending judgment of 6/9/53 has been docketed and entered this day in the above entitled case.

Dated: Los Angeles, California, March 30, 1955.

/s/ By C. A. SIMMONS,
Deputy Clerk [197]

[Title of District Court and Cause.]

MOTION TO SET ASIDE JUDGMENT, FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO SET CASE FOR TRIAL, STATEMENT OF REASONS IN SUPPORT THEREOF AND NOTICE OF MOTION

Defendants Glens Falls Indemnity Company, a corporation, and E. F. Grandy, Inc., a corporation, respectfully move this Honorable Court for an or-

der setting aside the judgment, findings of fact and conclusions of law heretofore entered in this action, and further move this Honorable Court for an order setting said case for trial.

The grounds for this motion are set forth in the accompanying Statement of Reasons. This motion will be made and based upon the decision of the United States Court of Appeals for the Ninth Circuit, No. 14,258, filed in said court on August 30, 1955, and upon the records, papers and pleadings on file in this [198] action.

Dated this 29th day of September, 1955.

JOHN E. McCALL,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorney for Glens Falls Indemnity Company and E. F. Grandy, Inc.

Statement of Reasons in Support of Motion

On August 30, 1955, the United States Court of Appeals for the Ninth Circuit filed its per curiam opinion in the matter of the appeal of Glens Falls Indemnity Company and E. F. Grandy, Inc., Appellants, vs. American Seating Company, Appellee, which said appeal was taken from the judgment of this Honorable Court in the above-entitled case. A copy of said opinion is attached hereto and made a part hereof and is marked "Exhibit A".

The United States Court of Appeals held that the appeal was premature because the judgment did not dispose of the entire case and Rule 54(b), Fed-

eral Rules of Civil Procedure, was not complied with.

This opinion is the law of the case and it was therein held that the claims against the respective defendants were not separately stated, but one claim was asserted against Glens Falls Indemnity Company and E. F. Grandy, Inc., and a different claim on a different theory was asserted against Farmers & Merchants Bank of Long Beach. It is apparent from the opinion of the United States Court of Appeals that the theories for recovery against the respective defendants are mutually exclusive and it is obvious that only one recovery may be had by plaintiff, so that if Farmers & Merchants Bank of Long Beach is liable to plaintiff, recovery against Glens Falls Indemnity Company and E. F. Grandy, Inc., cannot be warranted. No trial of the issue of liability of Farmers & Merchants Bank of Long Beach has been had and it is apparent from the decision of the United States Court of Appeals that trial to determine liability of said defendant must be had before the case may be disposed of since it is the contention of the other defendants that if the said Farmers & Merchants Bank of Long Beach is liable, the other defendants are not. Said defendants have a substantial [200] interest in the trial of such issue and the same cannot be tried independently of the issue of liability of Glens Falls Indemnity Company and E. F. Grandy, Inc.

In view of the fact that the liability of Farmers & Merchants Bank of Long Beach affects the lia-

bility of the other defendants, this is not the type of case contemplated by Rule 54(b) of the Federal Rules of Civil Procedure where judgment is authorized against one defendant if the liability of such defendant is not affected by the determination of the issues with respect to other defendants. [201]

* * * * *

We respectfully submit that in the instant case the entire matter may be determined in one trial, thus avoiding the costs of piece-meal review and at the same time without denying justice by delay, and that the case should therefore be set for trial as to all issues and one determination disposing of the entire case should be made.

Respectfully submitted,

JOHN E. McCALL,
/s/ By ALBERT LEE STEPHENS, JR.,

Notice of Motion

To Wolfson & Essey and Irving H. Green, attorneys for plaintiff, and to M. W. Horn, attorney for Farmers & Merchants Bank of Long Beach:

Please Take Notice that the undersigned will bring the above motion on for hearing before the above-entitled Court in the courtroom of the Honorable Ernest A. Tolin, Judge, in the United States Post Office and Court House Building, Los Angeles, California, on the 24th day of October, 1955, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel may be heard.

Dated: September 29, 1955.

JOHN E. McCALL,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorney for Glens Falls Indemnity Company and E. F. Grandy, Inc.

Affidavit of Service by Mail Attached. [204]

[Endorsed]: Filed September 30, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Oct. 14, 1955, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: None; Counsel for Plaintiff: No appearance; Counsel for Defendants: No appearance.

Proceedings: Pursuant to request of attorneys It Is Ordered that hearing on motion heretofore set for Oct. 24, 1955, is continued to Oct. 31, 1955, 10 a.m.

JOHN A. CHILDRESS,
Clerk [205]

[Title of District Court and Cause.]

NOTICE OF MOTION TO AMEND JUDGMENT NUNC PRO TUNC, STATEMENT OF REASONS IN SUPPORT THEREOF

To Glens Falls Indemnity Company and E. F. Grandy, Inc.; and John E. McCall and Albert Lee Stephens, Jr., their attorneys; Farmers & Merchants Bank of Long Beach and M. W. Horn, its attorney:

Please Take Notice that, plaintiff American Seating Company, a corporation, will move the above entitled Court for an order nunc pro tunc amending the judgment heretofore entered in this action, in the Courtroom of the Honorable Ernest A. Tolin, in the United States Post Office and Court House Building, Los Angeles, California, on the 31st day of October, 1955, at the hour of 10:00 a.m., or as soon thereafter as counsel may be heard.

The grounds for this motion are set forth in the accompany Statement of Reasons. This motion will be made and based upon the decision of the United States Court of Appeals, Ninth Circuit, No. 14258, filed in said Court on August 30, 1955, and upon the records, papers and pleadings filed in this action.

Dated this 18th day of October, 1955.

BURNETT L. ESSEY and
IRVING H. GREEN,
/s/ By BURNETT L. ESSEY,
Attorneys for Plaintiff [206]

Statement of Reasons

The United States Court of Appeals, Ninth Circuit, filed a per curiam opinion on August 30, 1955, in the matter of the appeal of Glens Falls Indemnity Company and E. F. Grandy, Inc., vs. American Seating Company, which appeal was taken from the judgment of this Honorable Court. The Appellate Court held that the appeal was premature because the judgment below did not dispose of the entire case by the method provided in Rule 54(b) Federal Rules of Civil Procedure. The Court of Appeals stated in its opinion that the record is "devoid of any compliance with Rule 54(b), Federal Rules of Civil Procedure."

Rule 54(b), Federal Rules of Civil Procedure, entitled "Judgment on Multiple Claims," provides for a method by which the Court can direct a final judgment on less than all the claims in an action containing multiple claims. The Court must make "an express determination that there is no just reason for delay" and also must make "an express direction for an entry of judgment." The rule concludes by stating that, in the absence of such determination, any order adjudicating less than all the claims shall not terminate the action, and the order is subject to revision any time before adjudication of all the claims.

It is the position of the plaintiff that such compliance with Rule 54(b) should be accomplished by this Court by means of an order nunc pro tunc amending the original judgment to include the necessary language of Rule 54(b).

This is a case with several claims on several theories and thus it is a proper case for the application of Rule 54(b). In the original trial of the case a stipulation and order were entered to hold the action as against Farmers and Merchants Bank of Long Beach in abeyance and to separate the issues for trial. On Page 99 of the Transcript of Record submitted to the United States [207] Court of Appeals in the appeal of this action, this Honorable Court stated that it is possible to sever and try issues piecemeal under the federal procedure. The stipulation and order were made on Page 107 of said transcript. A judgment was subsequently entered in favor of plaintiff, American Seating Company, and against the defendants, Glens Falls Indemnity Company and E. F. Grandy, Inc.

There is, therefore, only one further step required in order to have a complete record and a final judgment under Rule 54(b). There must be a technical compliance with the wording of said rule that there be "an express determination that there is no just reason for delay" and that there be "an express direction for entry of judgment." The plaintiffs hereby request the Court to make such compliance, since there is no just reason to delay the finality of this judgment. [208]

* * * * *

We respectfully submit that in the present case, there has been a judgment entered in favor of plaintiff on one of its mutiple claims; that this was done by order of this Court and by stipulation of all parties; that the only formality lacking is "an

express determination that there is no just reason for delay" and "an express direction for an entry of judgment" on this single claim. We therefore pray for an order nunc pro tunc amending the [209] original judgment and including the above language, as required by Rule 54(b), Federal Rules of Civil Procedure.

Respectfully submitted,

BURNETT L. ESSEY and
IRVING H. GREEN,
/s/ By BURNETT L. ESSEY,
Attorneys for Plaintiff [210]

Affidavit of Service by Mail attached. [211]
[Endorsed]: Filed October 24, 1955.

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEYS

To Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.; and John E. McCall and Albert Lee Stephens, their attorneys; and Farmers & Merchants Bank of Long Beach and Charles Z. Walker, its attorney:

Plaintiff hereby substitutes Burnett L. Essey and Irving H. Green as its attorneys of record in the place and stead of Wolfson & Essey and Irving H. Green.

AMERICAN SEATING COMPANY,
/s/ By R. H. ZIMMERMAN

We consent to the above substitution.

WOLFSON & ESSEY and
IRVING H. GREEN,
/s/ By BURNETT L. ESSEY [212]

The above substitution is accepted.

BURNETT L. ESSEY and
IRVING H. GREEN,
/s/ By BURNETT L. ESSEY

Dated this 21st day of October, 1955. [213]

Affidavit of Service by Mail attached. [214]
[Endorsed]: Filed October 24, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Oct. 31, 1955, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Virginia Wright; Counsel for Plaintiff: Irving H. Green; Counsel for Defendants: Albert Lee Stephens, Jr., for Glens Falls and E. F. Grandy, Inc., Chas. Z. Walker for Farmers & Merchants Bank of Long Beach Calif., Walker & Horn by D. Thomas Johnstone.

Proceedings:

For hearing on motion of defendant Glens Falls Indemnity Co. and E. F. Grandy, Inc., to set aside judgment, findings of fact, and conclusions of law and to set case for trial, and

For hearing on motion of plaintiff to amend judgment heretofore entered, nunc pro tunc.

It Is Ordered that stipulation for dismissal as to defendant Farmers & Merchants Bank of Long Beach, signed by the Court this day, be set aside and that said dismissal not be filed.

On motion of Attorney Stephens It Is Ordered that hearing on all matters calendared for today are continued to Jan. 16, 1956, 1:30 p.m.

JOHN A. CHILDRESS,
Clerk [215]

[Title of District Court and Cause.]

MANDATE

The President of the United States of America:

To the Honorable, the Judges of the United States District Court for the Southern District of California, Central Division, Greeting:

Whereas, lately in the United States District Court for the Southern District of California, Central Division, before you or some of you, in a cause between American Seating Company, a New Jersey Corporation, Plaintiff, and Glens Falls Indemnity Company, a New York Corporation, E. F. Grandy, Inc., a California Corporation, and Farmers & Merchants Bank of Long Beach, a California Corporation, Defendants, No. 14305-T, a Judgment was duly filed on the 9th day of June, 1953; which said

Judgment is of record and fully set out in the office of the Clerk of the said District Court in said cause, to which record reference is hereby made and the same is hereby expressly made a part hereof.

And Whereas, the said Glens Falls Indemnity Company, etc., et al., appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 29th day of March, in the year of our Lord, one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the appeal in this cause be, and hereby is, dismissed.

(August 30, 1955.) [216]

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the third day of October

in the year of our Lord one thousand nine hundred and fifty-five.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk, United States Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Dec. 13, 1955.

[Endorsed]: Judgment docketed and entered Dec. 15, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Jan. 16, 1956, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Virginia Wright; Counsel for Plaintiff: Irving H. Green; Counsel for Defendants: Albert Lee Stephens, Jr., for Glens Falls and E. F. Grandy, Inc.; D. Thos. Johnstone, Jr., for Farmers & Merchants Bank, Long Beach.

Proceedings: For hearing on (1) motion of defendant Glens Falls Indemnity Co., and E. F. Grandy, Inc., to set aside judgment, findings of fact, and conclusions of law and to set case for trial; and (2) motion of plaintiff to amend judgment heretofore entered, nunc pro tunc.

Attorney Stephens urges defendants' motion to set aside judgment and findings and set case for trial.

Attorney Green argues in opposition to defend-

ants' motion and urges the Court to enter dismissal as to defendant Farmers & Merchants Bank.

Attorney Johnstone urges entry of dismissal as to Farmers & Merchants Bank.

Court Orders that cause as to all motions stand submitted.

JOHN A. CHILDRESS,
Clerk [217]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated, by and between the plaintiff and the defendant Farmers & Merchants Bank of Long Beach, a California corporation, that the above entitled action may be dismissed without prejudice as to the defendant Farmers & Merchants Bank of Long Beach, a California corporation. That said dismissal shall be without cost to either party.

Dated this 15th day of October, 1955.

BURNETT L. ESSEY and
IRVING H. GREEN,
/s/ By IRVING H. GREEN,
Attorneys for Plaintiff
/s/ WALKER & HORN,
/s/ By CHARLES Z. WALKER,
Attorneys for Defendant Farmers & Merchants Bank of Long Beach

ORDER

Upon reading and filing the within Stipulation and good [218] cause appearing therefor,

It Is Hereby Ordered that the above entitled action may be dismissed as against the defendant Farmers & Merchants Bank of Long Beach without prejudice.

Dated this 31st day of October, 1955.

/s/ ERNEST A. TOLIN,
Judge

The Clerk is directed to enter the above order. March 23, 1956.

/s/ ERNEST A. TOLIN,
Judge [219]

[Endorsed]: Filed, docketed and entered March 23, 1956.

[Title of District Court and Cause.]

ORDER EX PARTE NUNC PRO TUNC

Good cause appearing therefor:

It Is Hereby Ordered, Adjudged and Decreed that, the final judgment heretofore entered in favor of the plaintiff American Seating Company, a New Jersey corporation, against Glens Falls Indemnity Company, a New York corporation, and E. F. Grandy, Inc., a California corporation, on the 9th day of June, 1953, is hereby amended nunc pro

tunc as of the 9th day of June, 1953, to include the following language:

"This Court expressly directs the entry of judgment in favor of the plaintiff and against Glens Falls Indemnity Company, a New York corporation and E. F. Grandy, Inc., a California corporation. This Court makes the express determination that there is no just reason for delay in the entry of said judgment."

Dated this 30th day of March, 1956.

/s/ ERNEST A. TOLIN,
Judge of the District Court [220]

[Endorsed]: Filed, docketed and entered March 30, 1956.

[Title of District Court and Cause.]

MOTION FOR RELIEF PURSUANT TO F.R. C.P. 60, STATEMENT OF REASONS IN SUPPORT THEREOF AND NOTICE OF MOTION

Defendants Glens Falls Indemnity Company, a corporation, and E. F. Grandy, Inc., a corporation, respectfully move this Honorable Court for an order relieving said parties from the final judgment in the above entitled case in the respects set forth in the grounds for this motion as hereinafter stated.

The grounds for this motion are set forth in the accompanying statement of reasons. This motion will be made and based upon all of the records,

papers and pleadings on file in this action and upon the Clerk's minutes and dockets and transcripts of proceedings herein and upon the accompanying affidavit. [221]

Dated this 3rd day of April, 1956.

JOHN E. McCALL,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorney for Glens Falls Indemnity Company and E. F. Grandy, Inc. [222]

Statement of Reasons in Support of Motion

On September 30, 1955 the moving parties herein filed a Motion to Set Aside Judgment, Findings of Fact and Conclusions of Law and to Set Case for Trial, Statement of Reasons in Support Thereof, Points and Authorities and Notice of Motion. Subsequent thereto, on or about the 18th day of October, 1955, plaintiff filed a Notice of Motion to Amend Judgment Nunc Pro Tunc, Statement of Reasons in Support Thereof and Points and Authorities and both motions came on for hearing on October 31, 1955 before the Honorable Ernest A. Tolin, United States District Judge. On said day plaintiff filed a stipulation for dismissal of Farmers & Merchants Bank of Long Beach. On that day the court ordered that stipulation for dismissal as to defendant Farmers & Merchants Bank of Long Beach be set aside and that said dismissal not be filed and an oral motion to file said stipulation was made in open court by counsel for plaintiff. All matters were then continued for argument to Janu-

ary 16, 1956 at 1:30 p.m. At said time the aforesaid three motions were argued and submitted.

On April 3, 1956 counsel for defendants, the moving parties herein, received notice from the Clerk of the court, which said notice was dated March 30, 1956, that the court had entered nunc pro tunc order amending judgment of June 9, 1953 and that said order had been docketed on March 30, 1956. This order was in effect a ruling upon the second motion hereinabove referred to. The first motion above referred to was not ruled upon at all. Upon telephone call to the Clerk's office immediately upon receipt of the aforesaid notice from the Clerk, which was received April 3, 1956, counsel for defendants was [223] advised that the stipulation for the dismissal of the Farmers & Merchants Bank of Long Beach was docketed March 23, 1956. Presumably this was in effect a ruling upon the oral motion of counsel for plaintiff hereinabove referred to. No notice of the docketing of such order was received by counsel for defendants and said counsel is advised and believes and thereupon alleges that no notice of the docketing of such stipulation was given to any of the parties to this litigation either orally or in writing.

Ten days had already expired on April 2, 1956 and one day prior to any knowledge of the docketing of such dismissal. Counsel for plaintiff has argued and counsel for defendants believes that upon the dismissal of said defendant, the Farmers & Merchants Bank of Long Beach, the judgment heretofore entered on June 9, 1953, became final

and appealable since with the dismissal of said defendant no further matter was left for determination in the trial court and the judgment from that date forward is no longer a judgment upon one of multiple claims.

The Clerk's failure to give notice of the docketing of said order is a breach of the Clerk's duty as provided in F.R.C.P. 77(d) and constitutes a clerical mistake or inadvertence entirely outside the knowledge or control of the moving parties or their counsel, which mistake has caught counsel for the moving parties by surprise and has deprived him of an opportunity to move pursuant to F.R.C.P. 59 for a new trial or to alter or amend the judgment.

The order nunc pro tunc amending the judgment of June 9, 1953, is, we respectfully submit, an inadvertent error on the part of this Honorable Court in one of two respects: Either (1) that the dismissal of the Farmers & Merchants Bank of Long Beach having been filed, the judgment has at that point become [224] final and appealable and the said nunc pro tunc order is of no force and effect insofar as the appealability of said judgment is concerned; or (2) it would appear to amend the said judgment in such a way since the same is ordered nunc pro tunc as to render the judgment final as of June 9, 1953, thereby ostensibly defeating defendants' right to appeal, which, we respectfully submit, was not the intention of this court.

At the time of the argument of the aforesaid motions counsel for plaintiff conceded that the

judgment was in error to the extent of an excess of the amount to which plaintiff claimed it was entitled in the sum of $231.63.

F.R.C.P. 60(b)(6) authorizes the District Court to give relief from the operation of any judgment for any reason justifying the same upon motion made within a reasonable time and this motion was made on the day that the reasons for relief were discovered.

Defendants, the moving parties, respectfully urge the court that they are entitled to the relief hereinabove requested correcting the judgment as to amount and eliminating the apparent effect of a nunc pro tunc order and said parties respectfully represent to the court that the surest and best way to obtain said relief and to protect defendants' right of appeal is by setting aside the judgment presently entered and the entry of a new judgment correcting the amount of the judgment and in the light of the dismissal of the Farmers & Merchants Bank of Long Beach, eliminating the nunc pro tunc order of amendment.

Defendants further very respectfully represent to the court that they are entitled to relief from the entire judgment in view of the court's statement made in open court either on October 31, 1955 or January 16, 1956, to the effect that the [225] case had not been presented to the court at the time of trial in a manner which enabled the court to understand the case of the defendants, whereby it appears that judgment against defendants was in

effect granted without full consideration of the merits of defendants' case.

* * * * *

Respectfully submitted,

JOHN E. McCALL,
/s/ By ALBERT LEE STEPHENS, JR.

Duly Verified. [227]

Notice of Motion and Order Shortening Time

Whereas, the undersigned United States District Judge will not have a motion calendar until April 23, 1956; and

Whereas, it seems desirable to hear and determine the within motion prior to said date;

Now, Therefore, on motion of counsel for defendants Glens Falls Indemnity Company and E. F. Grandy, Inc. and good cause appearing therefor, the time for notice of the within motion is hereby shortened to one day to enable the same to be heard Friday morning, the 6th day of April, 1956, at the hour of 3 o'clock p.m. on said day provided that service of said motion is accomplished by delivering a copy of said motion and notice thereof to the office of Irving H. Green, one of counsel for plaintiff, on Wednesday, April 4, 1956, before the hour of 5:00 o'clock p.m.

Dated: April 4, 1956.

/s/ ERNEST A. TOLIN,
United States District Judge

To Wolfson & Essey and Irving H. Green, Attorneys for Plaintiff:

Please Take Notice that the undersigned will bring the above motion on for hearing before the above entitled court in the court room of the Honorable Ernest A. Tolin, Judge, in the United States Post Office and Courthouse Building, Los Angeles, California, on the 6th day of April, 1956 at the hour of 3:00 o'clock p.m., or as soon thereafter as counsel may be heard.

Dated: April 4, 1956.

JOHN E. McCALL,

/s/ By ALBERT LEE STEPHENS, JR.

[Endorsed]: Filed April 4, 1956.

[Title of District Court and Cause.]

EX PARTE MOTION FOR STAY OF EXECUTION PURSUANT TO F.R.C.P. RULE 62 (b)

Come now Glens Falls Indemnity Company and E. F. Grandy, Inc., defendants in the above captioned action, and move the court for a stay of execution of the judgment in the within action pending the disposition of the motion made by said parties pursuant to F.R.C.P. Rule 60 filed concurrently with the presentation of this motion for stay of execution.

Dated: April 3, 1956.

JOHN E. McCALL,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorney for Glens Falls Indemnity Company and E. F. Grandy, Inc.

Execution shall not issue on the judgment herein until further order of this Court.

/s/ ERNEST A. TOLIN,
Judge [229]

[Endorsed]: Filed, docketed and entered April 4, 1956.

[Title of District Court and Cause.]

NOTICE

You are hereby notified that Order for Stay of Execution of Judgment has been docketed and entered this day in the above entitled case.

Dated: Los Angeles, California, April 4, 1956.

/s/ By C. A. SIMMONS,
Deputy Clerk [230]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 6, 1956, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Virginia Wright; Counsel for Plaintiff: Frederick Tankel; Counsel for Defendants: Albert Lee Stephens, Jr.

Proceedings: For hearing on defendant's motion for relief pursuant to Rule 60, FRCP.

Attorney for defendant urges three points, to wit:

(1) nunc pro tunc order, dated March 30, 1956, be recalled and set aside;

(2) Judgment itself be recalled; and

(3) A new and corrected judgment be entered.

Pursuant to the stipulation of counsel entered into the record, these motions are ordered granted.

Attorney for defendant renews motion to set aside findings of fact and conclusions of law and judgment and to set the matter for trial. Court orders said motion denied.

Court requests attorneys to agree upon form of judgment to be entered and have the same submitted as soon as possible for the Court's signature.

JOHN A. CHILDRESS,
Clerk [231]

In the District Court of the United States, Southern District of California, Central Division

No. 14305-T

AMERICAN SEATING COMPANY, a New Jersey corporation, Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a New York corporation, E. F. GRANDY, INC., a California corporation, et al., Defendants.

JUDGMENT

The Court, having made its Findings of Fact and Conclusions of Law, and good cause appearing therefor, renders judgment as follows:

I.

It Is Ordered, Adjudged and Decreed that plaintiff shall have and recover from the defendants, Glens Falls Indemnity Company, a New York Corporation, and E. F. Grandy, Inc., a California Corporation, jointly, the sum of $6,124.37, plus interest on said sum of $6,124.37 at seven per cent (7%) per annum from and after April 15, 1950, to date of judgment, that is to say interest in the sum of $2,572.24, or a total sum of $8,696.61. [232]

II.

It Is Further Ordered, Adjudged and Decreed that plaintiff shall have and recover from the defendants, Glens Falls Indemnity Company, a New

York Corporation, and E. F. Grandy, Inc., a California corporation, jointly, plaintiff's costs in this action.

III.

The Clerk is directed to enter judgment accordingly.

Costs taxed at $66.87.

Dated: This 16 day of April, 1956.

/s/ ERNEST A. TOLIN,
Judge, United States District Court, Southern District of California, Central Division

Approved as to form:

John E. McCall,
/s/ By Albert Lee Stephens, Jr.,
Attorneys for Defendants [233]

[Endorsed]: Filed April 17, 1956. Docketed and Entered April 18, 1956.

[Title of District Court and Cause.]

NOTICE

You are hereby notified that judgment has been docketed and entered this day in the above-entitled case.

Dated: Los Angeles, Calif., April 18, 1956.

By C. A. SIMMONS,
Deputy Clerk [234]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Glens Falls Indemnity Company, a New York corporation, and E. F. Grandy, Inc., a California corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on April 18, 1956, and out of an abundance of caution, said defendants above named, do hereby further appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on June 9, 1953, a motion for new trial by said defendants having been denied by order entered December 30, 1953, the said judgment having become final on March 23, 1956, by dismissal [235] that day ordered and entered of defendant Farmers & Merchants Bank of Long Beach (See Glens Falls Indemnity Co. vs. American Seating Co., C.A. 9th, 1955, 225 F.2d 838) and subsequently set aside by order made in response to motion of defendants under Federal Rules of Civil Procedure, Rule 60, on the 6th day of April, 1956, in order that the judgment hereinabove appealed from and dated April 18, 1956, might be entered. Said appellants further appeal from that portion of the order of the District Court made the 6th day of April, 1956, denying defendants' motion to set aside Findings of Fact and Conclusions of Law and Judgment, and to set the matter for trial, the said order being in response to defendants' motion under Federal

Rules of Civil Procedure, Rule 60, above referred to.

Dated: April 19, 1956.

ALBERT LEE STEPHENS, JR., and
JOHN E. McCALL,
/s/ By JOHN E. McCALL,
Attorneys for Appellants [236]

[Endorsed]: Filed April 20, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That Glens Falls Indemnity Company, a New York corporation, and Great American Indemnity Company, a New York corporation, authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto American Seating Company, a New Jersey corporation, in the full and just sum of Ten Thousand Dollars ($10,000.00) to be paid to the said American Seating Company, its certain attorney, successors and assigns; to which payment well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Whereas, on June 9, 1953, in an action pending in the United States District Court for the Southern District of [237] California, Central Division, between American Seating Company, as plaintiff,

and Glens Falls Indemnity Company and E. F. Grandy, Inc., as defendants, a money judgment was rendered against said defendants; and

Whereas said judgment was subsequently recalled by the court and a new and corrected judgment was rendered against said defendants in the said action on April 18, 1956; and

Whereas, said defendants have filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the aforesaid judgments and from the partial denial of a motion made by defendants on April 6, 1956, to set aside the Findings of Fact, Conclusions of Law, and to set the matter for trial;

Now Therefore, the condition of this obligation is such that if Glens Falls Indemnity Company shall prosecute its appeal to effect and shall satisfy the judgment in full together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then this obligation to be void; otherwise, to remain in full force and effect.

The above named Surety, Great American Indemnity Company, hereby consents and agrees that in case of default or contumacy on the part of the Principal or said Surety, the Court may, upon notice to said Surety of not less than ten (10) days,

proceed summarily and render judgment against it in accordance with its obligation and award execution thereon.

In Witness Whereof, the Principal has hereunto set its hand and seal by duly authorized officer thereof and Surety has caused this bond to be executed by its duly authorized [238] attorney in fact and caused its corporate seal to be hereunto affixed this 20th day of April, 1956.

GLENS FALLS INDEMNITY COMPANY,

/s/ By JOHN E. McCALL,
Principal

[Seal] GREAT AMERICAN INDEMNITY COMPANY,

/s/ By WILLIAM H. McGEE,
Attorney in fact, Surety

Notary Public Certificate attached. [239]

Examined and recommended for approval as provided in United States District Court for the Southern District of California, Central Division, Local Rule No. 8.

ALBERT LEE STEPHENS, JR., and JOHN E. McCALL,

/s/ By ALBERT LEE STEPHENS, JR.,
Attorneys for Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.

I hereby approve the foregoing.

Dated this 20th day of April, 1956.

/s/ LEON R. YANKWICH,
Judge [240]

[Endorsed]: Filed April 20, 1956.

[Title of District Court and Cause.]

EX PARTE APPLICATION TO FILE SUPERSEDEAS BOND (F.R.C.P. 73(e).)

Appellant and defendant, E. F. Grandy, Inc., by its counsel of record, respectfully moves the court for an order authorizing it to file a Supersedeas Bond in compliance with F.R.C.P. Rule 73(d) on the ground that the Supersedeas Bond herein filed with notice of appeal was on behalf of its co-defendant herein, Glens Falls Indemnity Company, and not on behalf of E. F. Grandy, Inc.

This motion is made and based upon F.R.C.P. Rule 73(e).

Dated: April 23, 1956.

ALBERT LEE STEPHENS, JR., and
JOHN E. McCALL,
/s/ By ALBERT LEE STEPHENS, JR.

It is so ordered.

/s/ WM. M. BYRNE,
United States District Judge [242]

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That E. F. Grandy, Inc., a California corporation, and Great American Indemnity Company, a New York corporation, authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto American Seating Company, a New Jersey corporation, in the full and just sum of Ten Thousand Dollars ($10,000.00) to be paid to the said American Seating Company, its certain attorney, successors and assigns; to which payment well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Whereas, on June 9, 1953, in an action pending in the United States District Court for the Southern District of California, Central Division, between American Seating Company, [243] as plaintiff, and Glens Falls Indemnity Company and E. F. Grandy, Inc., as defendants, a money judgment was rendered against said defendants; and

Whereas, said judgment was subsequently recalled by the court and a new and corrected judgment was rendered against said defendants in the said action on April 18, 1956; and

Whereas, said defendants have filed Notice of Appeal to the United States Court of Appeals for the Ninth Circuit from the aforesaid judgments and from the partial denial of a motion made by

defendants on April 6, 1956, to set aside the Findings of Fact, Conclusions of Law, and to set the matter for trial;

Now Therefore, the condition of this obligation is such that if E. P. Grandy, Inc. shall prosecute its appeal to effect and shall satisfy the judgment in full together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then this obligation to be void; otherwise, to remain in full force and effect.

The above named Surety, Great American Indemnity Company, hereby consents and agrees that in case of default or contumacy on the part of the Principal or said Surety, the Court may, upon notice to said Surety of not less than ten (10) days, proceed summarily and render judgment against it in accordance with its obligation and award execution thereon.

In Witness Whereof, the Principal has hereunto set its hand and seal by the duly authorized officer thereof and Surety has caused this bond to be executed by its duly authorized attorney in fact and caused its corporate seal to be [244] hereunto affixed this 23rd day of April, 1956.

E. F. GRANDY, INC.,
/s/ By E. F. GRANDY, Pres.
Principal

[Seal] GREAT AMERICAN INDEMNITY COMPANY,

/s/ By W. J. McKINNON,
Attorney in fact, Surety

Notary Public Certificate attached. [245]

Examined and recommended for approval as provided in United States District Court for the Southern District of California, Central Division, Local Rule No. 8.

ALBERT LEE STEPHENS, JR., and JOHN E. McCALL,

/s/ By JOHN E. McCALL,

Attorneys for Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.

I hereby approve the foregoing.

Dated this 23rd day of April, 1956.

/s/ WM. M. BYRNE,
Judge [246]

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the District Court of the United States for the Southern District of California, Central Division:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, with reference to the Notice of Appeal heretofore filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc., in the above cause, transcript of the record in the above cause, prepared and transmitted as required by law and by rules of said court, and to include therein the record consisting of the following documents, or certified copies thereof, to wit:

1. Complaint, filed July 2, 1952.

2. Summons showing return of service as to Farmers & [247] Merchants Bank of Long Beach, Calif., and Glens Falls Indemnity Co., filed July 8, 1952.

3. Stipulation and Order extending time of defendant to answer to August 7, 1952, filed July 17, 1952.

4. Answer of defendant Glens Falls Indemnity Co., filed August 6, 1952.

5. Plaintiff's Interrogatories to defendant Glens Falls Indemnity Co., filed August 8, 1952.

6. Answers of defendant Glens Falls Indemnity Co. to plaintiff's Interrogatories, filed August 23, 1952.

7. Notice to counsel placing on setting calendar October 6, 1952 at 10:00 a.m., mailed September 17, 1952.

8. First Alias Summons as to E. F. Grandy, Inc., issued September 26, 1952.

9. Order continuing setting to January 5, 1953, entered October 6, 1952.

10. First Alias Summons with return of service, filed October 10, 1952.

11. Answer of defendant E. F. Grandy, Inc., filed October 22, 1952.

12. Plaintiff's request for admissions under Rule 36, filed November 28, 1952.

13. Plaintiff's Proposed Interrogatories to defendant E. F. Grandy, Inc., filed November 28, 1952.

14. Notice of plaintiff substituting Wolfson & Essey and Irving H. Green as attorneys of record instead of Wolfson & Essey, filed December 4, 1952.

15. Answers of defendant E. F. Grandy, Inc., to plaintiff's interrogatories, filed December 9, 1952.

16. Answers of defendant E. F. Grandy, Inc., to request for admissions under Rule 36, filed December 9, 1952. [248]

17. Order setting pretrial hearing for February 5, 1953 at 9:00 a.m., entered January 5, 1953.

18. Plaintiff's memorandum brief, filed January 27, 1953.

19. Memorandum brief of defendant Farmers & Merchants Bank of Long Beach, filed February 3, 1953.

20. Order continuing pretrial hearing to April 1, 1953, entered February 3, 1953.

21. Pretrial brief of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc., filed March 5, 1953.

22. Reply brief of plaintiff to pretrial brief of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc., filed March 26, 1953.

23. Minute order dated April 1, 1953, of proceedings in chambers that day, providing for admission of exhibits and setting case for trial May 8, 1953, and severing trial as to defendant Farmers & Merchants Bank of Long Beach.

24. Copy of contract Noy-16752 Spec. No. 30656, Navy Dept., Bureau of Yards and Docks, E. F. Grandy, Inc., Contractor, filed May 4, 1953.

25. Memorandum and order thereon that case proceed to trial May 8, 1953, filed May 5, 1953.

26. Minute order re proceedings on May 8, 1953.

27. Pretrial brief of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc., filed May 22, 1953.

28. Order that judgment be entered in favor of plaintiff, entered May 27, 1953.

29. Plaintiff's reply to defendants' brief, filed June 2, 1953.

30. Findings of Fact and Conclusions of Law, filed June 9, 1953.

31. Judgment, filed June 9, 1953. [249]

32. Plaintiff's cost bill, filed June 13, 1953.

33. Motion of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc. for new trial and points and authorities, filed June 19, 1953.

34. Notice of Motion for New Trial, filed June 19, 1953.

35. Minute order, entered June 25, 1953.

36. Minute order, entered September 30, 1953.

37. Minute order re proceedings October 19, 1953.

38. Plaintiff's points and authorities in opposition to defendants' motion for new trial, filed October 19, 1953.

39. Defendants' supplemental memorandum on motion for new trial, filed October 19, 1953.

40. Reply to points and authorities of plaintiff, filed October 23, 1953.

41. Order denying motion for new trial, entered December 30, 1953.

42. Ex parte motion of Glens Falls Indemnity Co. and E. F. Grandy, Inc. for Stay of Execution, filed January 11, 1954.

43. Ex parte motion and order for Stay of Execution to January 29, 1954, filed January 20, 1954.

44. Notice of Appeal of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc., filed January 26, 1954.

45. Supersedeas Bond in amount of $10,000 for defendant Glens Falls Indemnity Co., filed January 26, 1954.

46. Supersedeas Bond in amount of $10,000 for defendant E. F. Grandy, Inc., filed January 26, 1954.

47. All exhibits in evidence on behalf of plaintiff.

48. All exhibits in evidence on behalf of defend-

ants, Glens Falls Indemnity Co. and E. F. Grandy, Inc.

49. Reporter's Transcript of Proceedings, April 1, 1953.

50. Reporter's Transcript of Proceedings, May 8, 1953. [250]

51. Designation of Record on Appeal dated and filed February 15, 1954.

52. Designation of Record on Appeal by plaintiff and respondent dated February 17, 1954, filed February 18, 1954.

53. Plaintiff and Respondent's Objection to Designation of Non-Essential Matters by Defendants and Appellants, dated February 17, 1954, filed February 18, 1954.

54. Certificate of Clerk (of Trancript of Record on Appeal) dated March 2, 1954.

55. Order Ex Parte Nunc Pro Tunc dated June 1, 1953, and filed April 5, 1954. (This document was apparently correctly dated in typewriting as 1954 and erroneously changed to 1953 when it was signed.)

56. Mandate of the Court of Appeals for the Ninth Circuit filed December 13, 1955.

57. Motion to Set Aside Judgment, Findings of Fact and Conclusions of Law and to Set Case for Trial, Statement of Reasons in Support Thereof, Points and Authorities and Notice of Motion (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated September 29, 1955 and filed September 30, 1955.

58. Notice of Motion to Amend Judgment Nunc

Pro Tunc, Statement of Reasons in Support Thereof and Points and Authorities (filed by plaintiff) dated October 18, 1955 and filed October 24, 1955.

59. Minute Order dated October 14, 1955 continuing hearing on motions, being items 57 and 58 of this designation, to October 31, 1955.

60. Substitution of Attorneys, substituting Burnett L. Essey and Irving H. Green as attorneys of record for plaintiff instead of Wolfson & Essey and Irving H. Green, dated October 21, [251] 1955, filed October 24, 1955.

61. Minute Order dated October 31, 1955.

62. Stipulation for Dismissal of Farmers & Merchants Bank of Long Beach, dated October 31, 1955, and Order thereon dated October 31, 1955 and filed and docketed March 23, 1956.

63. Minute Order dated January 16, 1956.

64. Nunc Pro Tunc Order Amending Judgment of June 9, 1953, filed and docketed March 30, 1956.

65. Notice re said Nunc Pro Tunc Order, item 64 of this designation, dated March 30, 1956.

66. Motion for Relief Pursuant to F.R.C.P. 60, Statement of Reasons in Support Thereof, Points and Authorities and Notice of Motion and Order Shortening Time (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated April 3, 1956, filed April 4, 1956.

67. Ex Parte Motion for Stay of Execution Pursuant to F.R.C.P. Rule 62(b) (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated April 3, 1956, and Order thereon, filed and docketed April 4, 1956.

68. Notice dated April 4, 1956 that Order for Stay of Execution of Judgment docketed and entered April 4, 1956.

69. Minute Order dated April 6, 1956.

70. Judgment dated April 17, 1956 and entered April 18, 1956.

71. Notice dated April 18, 1956 that Judgment docketed and entered April 18, 1956.

72. Notice of Appeal by Glens Falls Indemnity Company and E. F. Grandy, Inc. dated April 19, 1956 and filed April 20, 1956.

73. Supersedeas Bond of Glens Falls Indemnity Company dated April 20, 1956 and filed April 20, 1956. [252]

74. Ex Parte Application to File Supersedeas Bond dated April 23, 1956 and Order thereon, all filed April 23, 1956.

75. Supersedeas Bond of E. F. Grandy, Inc., filed April 23, 1956.

76. This Designation of Record on Appeal.

77. Reporter's Transcript of Proceedings, October 31, 1955.

78. Reporter's Trancript of Proceedings, January 16, 1956.

79. Reporter's Transcript of Proceedings, April 6, 1956.

Pursuant to the provisions of Rule 75(o) of the Rules of Civil Procedure and pursuant to Rule 11 of the Rules of the United States Court of Appeals for the Ninth Circuit, as amended, request is hereby made that the Clerk of the above entitled court transfer all the original papers in the file dealing

with the action or the proceedings in which the appeal has been taken.

Appellants intend by this designation of record to designate the complete record and all the proceedings and evidence in the action.

Dated: April 30, 1956.

ALBERT LEE STEPHENS, JR., and
JOHN E. McCALL,

/s/ By JOHN E. McCALL,

Attorneys for Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc. [253]

Affidavit of Service by Mail attached. [254]

[Endorsed]: Filed May 1, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 254, inclusive, contain the original

Complaint;

Summons;

Stipulation Extending Time for Glens Falls Indemnity Co. to Answer;

Answer of Glens Falls Indemnity Co.;

Plaintiff's Interrogatories;

Answer of Glens Falls Indemnity Co. to Interrogatories;

First Alias Summons;

Answer of E. F. Grandy, Inc.;

Request of Plaintiff for Admissions;

Plaintiff's Interrogatories to E. F. Grandy, Inc.;

Substitution of Attorneys;

Answer of E. F. Grandy, Inc., to Interrogatories;

Answer of E. F. Grandy, Inc., to Plaintiff's Request for Admissions;

Plaintiff's Memorandum Brief;

Memorandum Brief of Farmers & Merchants Bank of Long Beach;

Pre-Trial Brief of Glens Falls Indemnity Co. and E. F. Grandy, Inc.;

Reply Brief of Plaintiff to pre-trial brief of Defendants;

Memorandum re Time of Trial;

Pre-Trial Brief of Glens Falls Indemnity Co. and E. F. Grandy, Inc.;

Plaintiff's Reply to Defendants' Brief;

Findings of Fact and Conclusions of Law;

Judgment;

Cost Bill of Plaintiff;

Motion for a New Trial by Glens Falls Indemnity Co. and E. F. Grandy, Inc.;

Notice of Motion for New Trial;

Defendants' Supplemental Memorandum on Motion for New Trial;

Points and Authorities of Plaintiff in Opposition to Defendants' Motion for a New Trial;

Reply to Points and Authorities of Plaintiff in Opposition to Defendants' Motion for a New Trial;

Ex Parte Motion for Ten-Day Stay of Execution filed by Defendants.

Ex Parte Motion and Order Thereon for Stay of Execution by Defendants;

Notice of Appeal;

Supersedeas Bond;

Supersedeas Bond;

Designation of Record on Appeal;

Designation of Record on Appeal by Plaintiff and Respondent;

Plaintiff and Respondent's Objection to Designation of Non-Essential Matter by Defendants and Appellants;

Certificate of Clerk;

Order Ex Parte Nunc Pro Tunc;

Motion to Set Aside Judgment;

Notice of Motion to Amend Judgment;

Substitution of Attorneys;

Mandate of the Court of Appeals for the Ninth Circuit;

Stipulation and Order Thereon for Dismissal;

Order Ex Parte Nunc Pro Tunc;

Motion for Relief;

Ex Parte Motion for Stay of Execution;

Judgment;

Notice of Appeal;

Supersedeas Bond;

Ex Parte Application to File Supersedeas Bond;

Supersedeas Bond;

Designation of Record on Appeal; which, together with a full, true and correct copy of the Minutes of the Court had on October 6, 1952, January 5, 1953, February 3, 1953, April 1, 1953, May 8, 1953, May 27, 1953, June 25, 1953, September

30, 1953, October 19, 1953, December 31, 1953, October 14, 1955, October 31, 1955, January 16, 1956, April 6, 1956; a full, true and correct copy of Notification of Entry of Judgment for April 18, 1956, for Setting for Trial on September 17, 1952, for Nunc Pro Tunc Order Amending Judgment on March 30, 1955, Order for Stay of Execution April 4, 1956, Notification of Entry of Judgment April 18, 1956; four volumes of Reporter's Transcript of Proceedings, Plaintiff's exhibits 1 to 17, inclusive and defendants' exhibits A, B and C; all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fee for preparing the foregoing record amount to $2.80, which sum has been paid by appellant.

Witness my hand and the seal of said District Court this 24th day of May, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

In the United States District Court for the Southern District of California, Central Division

No. 14,305-T

AMERICAN SEATING COMPANY,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, E. F. GRANDY, INC., FARMERS & MERCHANTS BANK OF LONG BEACH,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, October 31, 1955

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For the Plaintiff: Irving H. Green, 121 So. Beverly Dr., Beverly Hills, Calif. For the Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.: Albert Lee Stephens, Jr., 458 So. Spring St., Suite 535, Los Angeles, Calif. For the Defendant Farmers & Merchants Bank of Long Beach: Walker & Horn by D. Thomas Johnstone, 320 Pine Ave., Suite 511, Long Beach, Calif. [1*]

The Clerk: 14,305, American Seating Company vs. Glens Falls Indemnity Co., et al.

Hearing on motion of defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc., to set aside

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

judgment, findings of fact and conclusions of law and to set case for trial;

Hearing on motion of plaintiff to amend judgment heretofore entered, nunc pro tunc.

Mr. Stephens: I am ready, if your Honor please. I have just been advised by Mr. Green that he has dismissed,—I don't know if your Honor has entered an order of dismissal as against the Farmers & Merchants Bank of Long Beach. I am caught unprepared on this, in effect.

The Court: It catches me unprepared. He came in just before I came to the bench, and that bank hasn't filed a responsive pleading, at least so far as my file shows, so I think he has a right, as a matter of law, to dismiss. What effect that has I just can't tell at this moment.

I suppose, while Mr. Green has reserved it, you haven't. So how much time do you want?

Mr. Stephens: I don't know what I should say about that. I do feel this way about it, though: It could have been dismissed in the Court of Appeals, you know, as easily as here. There has been a month go by in which some thought [2] could have been given to that problem. It works rather a hardship upon my clients, because of the costs on appeal. If we go through again on appeal we are going to have to pay a new fee and so forth.

I would like to suggest this to the court: That probably in the life of every trial judge he wishes he had a moment he could take back that case on appeal and fix up some of the things that had happened, and I think this case presents an oppor-

tunity to do that, and that is really the reason I believe the judgment and the findings of fact should be set aside and the matter, notwithstanding the fact this has been dismissed, since the order certainly would not have become final until now, at least,—in other words, it is back in your jurisdiction and you have the power and authority to enter new findings of fact or set the case for trial and so forth.

I would like the matter put over, if your Honor please, but I think that if it could be at a time when you would have an opportunity to read the briefs on appeal, that it would refresh your Honor's recollection with regard to the entire case, and point out a number of things that have really worked a substantial injustice.

For example, purely just a typographical error has been made, of a difference, to the disadvantage to my client of $231.63, which seems to me, since it almost covers the costs [3] of the briefs, it ought to be corrected. Now, this is an opportunity to do it. And that those things should be done. And I would like to give consideration to the situation as we now find it, and then be able to argue the case before the court at a time when perhaps it would be fresher in your Honor's mind.

The Court: Well, when would you like to do it?

Mr. Stephens: Any time. Two weeks would be fine, or a shorter period.

The Court: We are engaged or about to be engaged in a long trial, and being subjected to the hearing of certain seamen's cases, which we must

hear when the vessels touch the Port of Los Angeles. If I had my diary I could tell——

Mr. Green: May I be heard a moment before the court seeks its diary?

The Court: The court has found its diary, but you may be heard.

Mr. Green: I recognize it is the policy of the court to give counsel as much time as necessary in any situation. Normally, I don't oppose the granting of additional time. Goodness, I have asked for additional time many times myself.

Here is the situation that now exists in this case: The court made a judgment in favor of the American Seating Company a long time ago. It was set by the Court of Appeals, or, at least, the Court of Appeals made an opinion and said [4] the appeal was premature, the appeal of Glens Falls and the Grandy Company was premature, because the court had failed to put into its findings the magic phrase to the effect that there was no occasion for delay. I forget the exact wording.

The Court: I hadn't disposed of the fact that, as I gather it quickly now, has been disposed of by your dismissal.

Mr. Green: Yes. The point I am making now, your Honor, is that the case against the Farmers & Merchants Bank has been dismissed. This court, I respectfully submit, has no jurisdiction to in any way change its judgment or order at this time—more than six months have elapsed since the original judgment was made — except to amend the

judgment nunc pro tunc, in order to put in the qualifying phrase, if that was necessary.

But that is not necessary any more. The judgment is here and the burden is on the bonding company and the contractor to determine what course of action it may take, so far as that judgment is concerned.

I respectfully submit, even if this court had the inclination to reopen the judgment or modify the judgment, in any material sense, or grant a new trial, that the court does not have jurisdiction to do it, and, of course, that is the reason I said that you should hear me before reaching for the diary, because I don't see there is anything to continue at this time. [5]

They have made a motion for the court to vacate the judgment and grant a new hearing. I ask your Honor that that motion be denied, because the court does not have jurisdiction, and I challenge counsel to show the court it has jurisdiction by any authority to do that. If the court hasn't that authority, then what is the purpose of our coming back again, your Honor?

The Court: You can challenge him, but he has an opportunity, I think, to analyze the situation which has been created, and check into the jurisdiction.

While I rather surmise that what is going to come out of it is, in effect, an urgent suggestion to me to change my mind on the principal case. I think he does have the right to canvass the record,

in the light of the changes which have come into it, and make whatever motions are proper.

Mr. Green: Then, your Honor, if the court is going to grant time for that purpose, the only time that would be convenient to me would be some time in January, because of the fact of the pressure of my calendar for the rest of this month and the first half of December, and I expect to be out of the city the last half of December and the first week of January.

The Court: Do you object to that, Mr. Stephens?

Mr. Stephens: The interest is running, if your Honor please. The judgment stays the way it is, I realize we have [6] taken a lot of time, but I want a careful hearing and I would much rather do that than object to it.

I do want to say this: This is an astonishing position to me, because what counsel is saying is that the judgment is now final and no appeal has been taken from it. The court, in spite of the fact the appellate court sent it back, saying that the judgment has never been final, that is, not final by his action, instead of the court's and as a result we may already have passed the time for appeal. I mean, that is the necessary further inference, which I am sure is not the law.

But I am fearful, since this is something that was entirely up to counsel, so far as the dismissal was concerned, I think that a judgment rendered on a case should recite or recognize or be made in the light of any such dismissal, so that the parties would be known. In other words, the court has so

far only made a partial judgment, if your Honor please. Something further would have to be done in order to make that final.

I would ask the court, if necessary, in order to protect my position, to forthwith set aside the judgment and findings, and you could always reinstate them. But I don't want to lose the power of appeal. I mean, even if it came today and went over to January, I might be in a bad position.

Mr. Green: May I point out, your Honor, if counsel is [7] in a bad position it is a bad position of his own making.

The Court: The court granted the dismissal of the bank, but it was on your motion.

Mr. Green: I am not talking about the bank. I am talking about the fact that counsel, when he filed his appeal, did not conform with the provisions of Rule 54(b).

Mr. Stephens: Now, I didn't draw those.

Mr. Green: Just a minute. It was his function, your Honor, if he wanted to have an appeal, he should have gotten the order of the court and all the cases that go on—all the cases where the counsel have come in and gotten an order nunc pro tunc, because they failed to do it, have been the appellants who have done that, because they are the ones who are interested in perfecting the appeal and conforming to the rules.

For him to say, "I missed out and didn't conform to the rule, to see this was a final judgment I appealed from, and, therefore, I now want relief, it wasn't us that made the mistake,——"

The Court: That was as much your duty as his; as much mine as both of you.

Mr. Green: Not under the decisions.

The Court: The appellate court thought so, because they sent it back and said, "Fix up the record, Judge. We will hear the case." [8]

Mr. Green: That isn't exactly what the Court of Appeals did.

Mr. Stephens: Wants to preserve the appeal——

Mr. Green: We didn't want to preserve the appeal. It was your function to preserve the appeal, if you wanted to appeal.

Mr. Stephens: If I may say, counsel drew the findings of fact and conclusions of law and so forth. The judgment is not final. He did not have a judgment he could execute on. It is just as much to his interest to have a final judgment, which would bear an execution, as it is that would bear an appeal; so it cuts both ways.

The Court: Well, let's see, are you in agreement?

Mr. Stephens: I am fearful of the time of appeal passing, your Honor. I mean if——

Mr. Green: If the time of appeal has passed—it hasn't. If it hasn't, whether it is next week or next month isn't going to make any difference, so far as I can see.

Mr. Stephens: I don't agree with counsel.

Mr. Green: I won't oppose the time.

The Court: Neither of you raised the point of the imperfection of the record, but the Circuit

Court did, and has given no intimation as to how they would rule on the merits of the case.

I think the most provident thing would be for me to set [9] aside the dismissal as to the bank today. I set that aside; withdraw it.

And then we will hear the motion and you can re-present that and I will act the same way again, when you are ready to argue the merits.

Then Mr. Stephens' right of appeal will be preserved, if I still stand by the position which I reached after a quite considerable trial we had here, Mr. Stephens, before you came into the case.

Mr. Stephens: I am familiar with the record, if your Honor please. I know what happened.

Mr. Johnstone: Your Honor, may I be heard?

The Court: Yes.

Mr. Johnstone: I am appearing for Walker & Horn. D. Thomas Johnstone.

Mr. Green: I didn't know you were appearing.

Mr. Johnstone: I wasn't quite sure of my status, your Honor, because the bank had been dismissed, but if your Honor is withdrawing the dismissal I would like to ask whether or not at this next hearing the propriety of the dismissal or the entry of the dismissal will be argued or discussed.

The Court: I anticipate that Mr. Green will present a dismissal again before the next hearing, and if he does I will grant it, unless you have answered and made it necessary for the consent of the bank to the entry of the dismissal by asking for some affirmative relief or something of that kind.

Mr. Johnstone: We would stipulate to the entry of the dismissal.

Mr. Green: They have so stipulated.

The Court: My only purpose in withdrawing the dismissal is to preserve the status quo, so Mr. Stephens will not be prejudiced on appeal by any action taken here today.

Mr. Johnstone: I understand that was the only——

Mr. Green: Then if your Honor is going to withdraw the dismissal at this time temporarily, then I ask that we go ahead with our motion this morning; our mutual motion. There is no reason for a continuance.

The Court: All right.

Mr. Green: Then Mr. Stephens isn't faced with any new situation and he can argue his motion. I want to argue mine for the order nunc pro tunc.

The Court: Are you ready to proceed, Mr. Stephens?

Mr. Stephens: Yes.

Mr. Johnstone: If I may say one thing. I came today prepared to see a dismissal entered, and I am not prepared to oppose the motion of Mr. Green.

The Court: Well, I understand you are moving ot dismiss again, are you, Mr. Green?

Mr. Green: We have a stipulation to dismiss as to the Farmers & Merchants Bank, and we so move.

Mr. Stephens: I suggest—— [11]

The Court: You are ready to argue, Mr. Stephens?

Mr. Stephens: I am ready to argue, not on the dismissal, if your Honor please. That was not what

I understood Mr. Green to want to do. But upon the motion to set aside the findings of fact and conclusions of law and the judgment, and resubmit the case for trial.

Now, Mr. Green has at the same time a motion on to add by order nunc pro tunc a finding of your Honor under 54(b), which would make the matter perfecting the appeal in effect. I think we are wasting our time today to argue if Mr. Green really intends to press the dismissal. I suggest if he makes that motion your Honor take it under advisement until such time as we can look into the other matter and argue it all at one fell swoop.

Mr. Green: This morning counsel has a motion before the court to vacate the judgment and have a hearing. If he wants to argue that, we are ready to argue with him on it.

The next motion on the nunc pro tunc may not be necessary, in view of the fact we have a stipulation to dismiss the case.

Now, I can't understand why Mr. Stephens would want more time if he is ready to argue. If he wants time and the court wants to grant it, I don't care one way or the other.

The Court: We are either going to have to retry the case, at least so far as the bank is concerned, or grant your [12] dismissal.

Mr. Stephens: That is my view.

Mr. Johnstone: Yes.

The Court: We are going to try this bank or dismiss the case as to them. You are not willing to dismiss or have it dismissed as to them and not

have some time in which to argue matters to this court, which arise by reason of that dismissal?

Mr. Stephens: That is correct.

The Court: I don't think in this type of case anything would arise, but it might. I don't know until I look into it. Or there might——

Mr. Stephens: Frankly, I don't know, either, your Honor.

The Court: I am not going to have——

Mr. Stephens: I would have been prepared if he had told me in advance he was about to file a dismissal and had let me in on it. That is the only thing that I don't think is quite fair, in the way this has been presented.

The same thing has happened before, if your Honor please. I made a motion on ample notice in the Ninth Circuit to correct the record because certain exhibits had been added into the record, which had not been admitted in evidence. On the morning of the hearing, and without letting me know at all, Mr. Green came down and obtained an order ex parte from your Honor, although I was right here [13] on the 16th floor and could have been heard.

It made no difference to me, if your Honor please, when he presented the order which made your Honor's intentions clear; I didn't further oppose it. But it seems to me these things should not come up at the last minute and preclude an opportunity to know what the meaning is.

So I think that we should continue this matter to a time that suits Mr. Green's convenience, on the

suggestion your Honor has made, and settle them all at one hearing.

The Court: Is January 16th at 1:30 an agreeable time?

Mr. Stephens: It would be agreeable to me.

The Court: Is it agreeable to you, Mr. Green?

Mr. Green: It is my impression it is, your Honor. I don't have my diary here.

The Court: The case is continued to January 16, 1956, at 1:30 in the afternoon, for consideration of all matters on the calendar today and all uncalendared matters presented to me in chambers, that is, the consideration of whether I shall direct the clerk to enter the order of dismissal as to the bank, pursuant to the stipulation which the bank and Mr. Green have executed.

Mr. Stephens: May the minutes show, if your Honor please, today's hearing, that your Honor has set aside the dismissal so that the record will be complete in that respect?

The Court: The clerk is directed to have the minutes [14] so show. If you wish a formal order on it and you think you get any more protection from the formal order, you may submit one.

(Whereupon, at 10:30 o'clock a.m., Monday, October 31, 1955, an adjournment was taken.)

[Endorsed]: Filed May 22, 1956.

Monday, January 16, 1956. 1:30 p.m.

The Court: I was not aware we had anything until American Seating Company vs. Glens Falls Indemnity.

Mr. Green: I am here representing American Seating Company.

The Court: I have had a call from Mr. Stephens, who represents your opponent. He said he was unavoidably detained. He was leaving immediately by cab and would be here in a few minutes.

Do you have anything else before that?

The Clerk: No, sir. Valderhaug at 2:00 o'clock.

The Court: Then we will adjourn until Mr. Stephens gets here.

(Short recess taken.)

The Court: All litigants now are represented?

The Clerk: Yes, they are all here.

The Court: Call the case.

The Clerk: 14,305, American Seating Company vs. Glens Falls Indemnity Co., et al.

Mr. Stephens: Ready for the moving party, your Honor please.

Mr. Green: We are ready here for American Seating Company.

Mr. Johnstone: Ready for the Farmers & Merchants Bank. [18]

The Court: There are two moving parties. Mr. Stephens moves to set aside the judgment, findings of fact, and conclusions of law, and set the case for trial.

The plaintiff moves to amend the judgment nunc pro tunc.

Mr. Stephens is on his feet, so I will hear him first.

Mr. Stephens: I wish to apologize to the court for being late. I am sorry about that.

My motion, if your Honor please, or, the situation is this: I noted that on the same day that decision came down in this case, relying upon Rule 54(b) as the reason for the decision, another decision was made involving the same rule and was filed in the Ninth Circuit Court of Appeals on the same day.

In that case, instead of sending it back to add to the judgment or for further action, or, rather, instead of sending it back as it was done in this case, they referred it back to the judge for the purpose of simply filling in what apparently appeared to that court as something that was overlooked.

Knowing of that fact, I felt in my own mind, since this case was not considered upon the merits at all in the appellate court, although argued upon the merits and briefed upon the merits, that possibly the court felt that your Honor might wish to further consider the question of making a finding, that time would be saved and the interest of justice, that the [19] two different matters which were mentioned in the complaint should be severed.

Now, I recognize that it is largely a matter of discretion, where there are two separate occurrences, giving rise to two separate claims, as to whether those particular issues would be tried in one action or are so severable that time would be saved and the convenience of the parties would be promoted by severing and trying one of the issues.

I, in my own mind, believe this case on the factual side is not the type of case where justice is

best served by severing the two separate issues. I say that for many reasons, but I think possibly the most obvious reason is that the case was tried on an agreed statement of facts which, unfortunately, is rather confusing from the record.

There was no witness sworn. It took only a day and yet the subsequent proceedings, as your Honor knows, have been very protracted, and all, because, at least, to my way of looking at this case the foundations which would make decision easy for your Honor were not laid.

Therefore, we think that this is not the proper case for an application of Rule 54(b).

The cases which were cited in my memorandum and which were cited in opposing counsel's memorandum point out that the application of Rule 54(b) is to the situation where there are two occurrences.

The appellate court held—and I think this undoubtedly is the law of the case—that there were two separate claims stated against the respective defendants; but in one count. I don't know that that was so obvious at the time of trial, because, as I read the record, the understanding more or less was that the Farmers & Merchants National Bank, as it one time expressed, was a stand-by defendant.

Counsel has argued in his reply memorandum that an order was made for separate trial of the Glens Falls matter by stipulation. I have searched the record and I don't find that the record confirms that statement.

I think it was done by order of the court. I don't

find in the record any expressed objection at that time to handling the case in that way.

The Court: Well, counsel, it doesn't apply just to the counsel who were representing the litigants at the time of trial, but counsel generally have a bad habit of talking to judges in the halls or in chambers, and the first thing you know there is kind of a tacit agreement or understanding that springs up or someone thinks it has.

I can't recall just where the conversations were had, but I do recall conversations to the effect that the trial be conducted along the lines that it was, although I don't think that is memorialized in any way in the record, as I have looked that record over since the matter went up on appeal. [21]

I have commenced in recent months to have a policy of having everything on the record, although if someone comes in to say good morning I am not going to the extent of having that on the record.

So many times counsel come in and begin on the basis of a friendly personal call, and they wind up with the presentation of some matter which will tend to shape judicial action; and that should never be done except on the record.

I am afraid it was done here, although the exact details of it are so faint in my memory I couldn't put my finger on them.

Mr. Stephens: I think your Honor is undoubtedly correct in your observations. That is the type of thing that happens sometimes and it is difficult to track it down to a later time. And, as your Honor

knows, I was not present at that time or in the case at that time, so I am handicapped.

Assuming it was done by tacit understanding, nevertheless, that more or less presupposed, as I gathered from the record, that by the time, if a judgment was granted against Glens Falls, the other party would be out.

This is a point I am trying to develop. The thought being that the one action that took place affected both defendants, and one may be liable primarily while maybe the other would be liable secondarily. I can't tell from the [22] complaint.

But I submit now that we are up against the situation where it may be that the bank has some liability—at least, the plaintiff says it does—and that that liability might be several or it might be joint or it might be joint several, dependent on how the court might look at those circumstances.

I would think that Glens Falls would have an interest in that part of the case, and that therefore from that one standpoint it would be more convenient to try the entire case at one time so that all parties may know how they stand.

The Court: That is apparently what the appellate court thought.

Mr. Stephens: That is what I thought.

The Court: I gather that from the way in which the case was decided there, it was decided upon a defective procedure rather than an adjudication of the substance of the controversy.

Mr. Stephens: That is true. For that reason,

your Honor please, my thought is that the best way —and there are other reasons I would like to mention before I am through—that the way to protect the record and to make it a record which cannot be subject to technical objections would be to set aside the findings of fact and conclusions of law and the judgment at this time, although it seems to me that, under the rule of this case—there is no final judgment, [23] you see, at this time, so if what has already been done would be set aside, even though after the case is again submitted your Honor may enter the same judgment and the same findings and the same conclusions, with only the additional finding, if necessary, under 54(b), that we would then have a clear record.

Of course, we have written and paid for briefs on appeal, which, if the same circumstances and legal issues are to be presented, can be presented on the same briefs if counsel is willing to stipulate, or perhaps by order of the appellate court it might be done.

I think that counsel's motion for a nunc pro tunc order is not proper, because that is designed, in effect, to defeat the right of appeal, saying, "Now, for a time when the appeal—right time to appeal is long since run, now you go back to add something which makes a judgment which was not final at that time," and would be to defeat the right of appeal, which, of course, I think could not be done. I think that the order would speak from the time the order is actually made. But it adds another point for appeal, if we have to appeal.

The Court: The mandate has been spread in this matter, hasn't it?

Mr. Stephens: I assume so.

The Clerk: I am pretty sure it has been. [24]

The Court: Let's check.

The Clerk: Yes, it is in here. It was filed as of December 13th.

The Court: The clerk says it was filed as of December 13th. Do you want to oppose Mr. Stephens' position, counsel?

Mr. Stephens: If your Honor please, I have two or three more points I would like to be heard on, to conclude the matter.

The Court: Are they asking for other disposition of the case, because upon the presentation you have made and upon my own examination of the file I am inclined to set aside the findings——

Mr. Stephens: No. They are all directed to the same point, your Honor.

The Court: ——heretofore made, and set the case for trial. But if you have something, you are asking for something more, we will hear it.

Mr. Stephens: No.

Mr. Green: Your Honor, this case was tried before your Honor on a stipulation between the parties. It was had in chambers, severing these two cases and putting the Farmers & Merchants Bank case as a stand-by case.

As a matter of fact, it was done on the suggestion of your Honor, that because the case as to the Farmers & Merchants Bank is entirely separate and distinct from this [25] case, and it has no re-

lationship whatsoever. In other words, it isn't a question of one or the other being responsible. The only point is that we would have no case against the Farmers & Merchants Bank at all if we recover against the bonding company and against the contractor, as we did in this case.

Now, we tried this case—we had the pretrial before your Honor in chambers. We tried the case before your Honor on the trial date. Then Mr. Stephens came into the case and made motions to set aside the findings and for a new trial.

The Court then again, on considering the evidence in the case, felt we were entitled to judgment and denied the motion for new findings or for a new trial or to set aside the judgment.

The Court: And the Circuit Court said I was wrong.

Mr. Green: Your Honor please, I can't understand that the Circuit Court said anything of the kind. The Circuit Court said—I have the opinion before me—that this was a judgment upon multiple claims and the record is devoid of any indication of compliance with Rule 54(b).

All that was necessary under 54(b) was for the court to state the fact that the court felt at that time that there was no need for any delay in the case, there was no need to proceed against the Farmers & Merchants Bank, that this judgment could be final. [26]

The court didn't put that in. Probably we should have called it to the court's attention. But the real onus of this thing, your Honor, is upon the defend-

ant in this case. The defendant wanted to appeal. He did file an appeal and it is his burden to see that the record is in shape so he can appeal.

That is not the burden of the court nor is it the burden of opposing counsel. That was his burden. He was the expert in federal procedure, who was brought into this case to argue the motion for a new trial and handle this appeal, and he failed to see that the record had the provision in there, the magic statement there was no need for delay.

There is nothing in this opinion that indicates any feeling, because, your Honor, there was nothing in this record about what took place as to the Farmers & Merchants Bank. In the record that was printed the discussion in regard to the status and position of the Farmers & Merchants Bank was omitted at the request of counsel. That was not even part of the record before the Court of Appeals.

The only thing they did—there is a jurisdictional requirement that before they can hear an appeal, when there is more than one claim in a case, is for the court to make the statement that there is no reason for delay. Otherwise, they have no jurisdiction. And all they held here was that [27] the appeal was premature, because they had no jurisdiction.

Now, your Honor, we have entered into a stipulation with the Farmers & Merchants Bank that was presented to your Honor and your Honor signed an order dismissing the case as to the Farmers & Merchants Bank.

And then at the last hearing we had here the

court said that day we should resubmit the motion to dismiss as to the Farmers & Merchants Bank, and I believe the indication of what your Honor said last time was that you would grant that motion.

The only reason for delay here was so that the appeal as against—any rights of appeal should not be affected by the fact you signed the order on the date we had the last hearing rather than today.

Now, I am very much surprised and taken aback by what the court's attitude seems to be this afternoon. Here the situation is where there is no action as against the Farmers & Merchants Bank now, since we have stipulated to dismiss it.

Does this court want us to litigate something that the parties don't want to litigate? And the only excuse that Mr. Stephens has for asking for setting aside the findings is the basis that since we have to try the case against the Farmers & Merchants Bank anyhow, then we should try their case this time, in effect, for a third time, because, of course, the fact is he doesn't set up any newly discovered facts [28] or any statement even that the evidence would be any different than it was in the other trial.

Here is a case your Honor tried once. A motion for a new trial was made by Mr. Stephens—went into it very thoroughly—and in their appeal they had to the court they didn't state anything except the same arguments that they used before this court as to a new trial, and that is to the effect that this poor bonding company that got their premiums for this and wrote two bonds, because they wrote two bonds they shouldn't be liable under

either one, which is the whole gist of their appeal.

It doesn't seem to me, either from the attitude the court took on the appeal, and, certainly, not from the opinion which merely says that, "Since the judgment is one of multiple claims, the record is devoid of any indication of compliance with Rule 54(b), Federal Rules of Civil Procedure. Under such circumstances, the appeal herein is premature."

And apparently since their counsel did not make any effort to get it amended, as he could have by a nunc pro tunc order——

The Court: Well then, why didn't you do it? The burden is on a person who wins a lawsuit to see that the findings presented to the trial court are in proper order.

Mr. Green: Your Honor, maybe I was remiss in not doing [29] it, but it seems to me that if anyone is remiss, the person who has an appeal, who makes an appeal, must see that his record is perfected for appeal.

Is the court going to blame me for my failure to do something to aid the other side in appealing his case? I don't think I would be doing right by my client if I took that attitude.

It would be nice for all lawyers to be as helpful to each other and to the court as possible, but you shouldn't criticize me for overlooking doing something that even now the court can correct.

We have asked two things here today. We asked it the last time of this hearing. One was that we

dismissed the case as to the Farmers & Merchants Bank.

The Court: That motion was granted, wasn't it?

Mr. Green: Yes, your Honor. And a signed order was made granting it. There is no action——

Mr. Stephens: Your Honor please, that was set aside, however.

Mr. Green: Wait a minute. Well, the court at the last hearing—counsel asked that you set it aside until today, so that he would have an opportunity to reconsider what he wanted to argue to this court. And he hasn't argued anything but the same things he argued last time and every time in this case.

The court said that at this time the court would re-instate the order of dismissal and that is what we are asking for. There is no sense in trying the lawsuit.

And talking about the responsibility of the party winning the lawsuit, we are perfectly willing to submit this record to the appellate court on the basis they will sustain it on the record as it is now. If they reverse it, then we will lose our judgment, and we have dismissed the case as to the Farmers & Merchants Bank.

We are satisfied this court was right, that the findings are right, and there is nothing to change and nothing to retry, unless the court is going to change its mind from time to time on the same facts and the same issues that exactly were submitted to this court on at least two occasions.

Even in the last argument that was had here on this motion that counsel made, the fact is that the

only question that came up was whether this court should give him some extra time to present something new, in view of the fact the court had dismissed the case as to the Farmers & Merchants Bank.

Counsel talks about the delays that have occurred since this court rendered its decision. The only delays have been caused by the appellant, not by anybody else.

The case for presentation and trial took a day, and then they made the delays by making the motion for a new trial, which was denied after full argument and full briefing on the [31] question.

Then they went up on appeal, and they didn't perfect their record on appeal and then, because the court says their appeal is premature—we are willing to have the record corrected by having the court put in the nunc pro tunc provision, as all the cases that were cited by Mr. Stephens himself say; that is the cure.

There isn't a single case where the court has held that 54(b) applies, that a new trial was granted because of 54(b).

Now, I want to refresh the court's memory as to the facts of this case, as to why there is no relationship between the action against Grandy and the bonding company and the action against the Farmers & Merchants Bank.

The court itself says, in the opinion he says, "A different claim on a different theory was asserted against the Farmers & Merchants Bank of Long Beach."

Now, we agreed that any reference to the Farmers & Merchants Bank and the action against them didn't even have to appear in the record, because everybody thought that didn't have anything to do with the issues in this case. That is an entirely different theory of constructive trusteeship; has nothing to do with the fundamental issues. If we tried the cases together it would be an impossible situation, your Honor. We couldn't get a judgment against both. And if we got a judgment against these same defendants, we [32] couldn't even proceed against the Farmers & Merchants Bank; we would have to try them piecemeal just the same.

This court very wisely saw that at the time of pretrial, and my recollection is that the court suggested that this could be severed, and we all agreed. Mr. McCall, who represented the clients now represented by Mr. Stephens, agreed. And Mr.—I forget the name of the man that appeared for the Farmers & Merchants Bank at that time, but he agreed.

And we agreed at the time when there was a final disposition of this case, we would dismiss as to the Farmers & Merchants Bank. I don't see, your Honor, where there is any place or any reason or the slightest suggestion of a reason why the case should have to be retried against Grandy, and this time if it is retried, if it would be retried I assume they would object to retrying it, on the cold record, on the stipulated facts we had. We would now have to call in witnesses and take a week to try a lawsuit that has been decided.

I want to raise one other question. I think I would much rather argue the proposition on the merits than technicality. There is a question in my mind whether this court has jurisdiction. It is always something that is ticklish to argue before any court, but I feel that this court feels once counsel presents any facts they have or any legal reason —here was a decision, your Honor, made over a year or so ago. There is no basis for this court to entertain a motion [33] at this stage of reopening that judgment, I don't believe.

I think I called that to the court's attention at the last time as well, that this court has no jurisdiction to vacate its judgments and orders that were made over that period of time.

The Court: Well, what does the mandate tell us to do? Let's look at the mandate.

All they did was dismiss the appeal.

Mr. Green: That is all the order, the decision of the court called for; didn't say anything about the merits of the case whatsoever.

Now, if they still have grounds for appeal, they can appeal the case again,——

The Court: Well, what——

Mr. Green: ——now that the case against Farmers & Merchants is dismissed.

The Court: What sticks in my mind, Mr. Green, is that when this case was presented the defendant Glens Falls was represented by an attorney who, so far as getting things over to me was concerned, just didn't get them over. The defense points, both as to the facts and as to the law, were such that I

felt the man was just talking in circles and I left the bench confused as to why he was defending the case, and since you had stated a good case for your client, I granted judgment. [34]

Now, since then the attorney who presented a confused defense here has been substituted out, and we have a very articulate man, and I would kind of like to hear the whole case properly presented by both sides instead of only by your side.

Mr. Green: Your Honor will remember Mr. Stephens, this articulate, competent lawyer, who is so experienced in federal trial practice, made the motion for a new trial before your Honor and retried the case for all intents——

The Court: You didn't retry a case on a motion——

Mr. Green: Your Honor, this was a case tried entirely on stipulated facts, and it was just as easy for him, if he could make your Honor see the light, so to speak, he could have done it on his motion at that time. There must be an end to litigation, and the mere fact that a company like Glens Falls Indemnity Company and E. F. Grandy, a contractor, people of that wealth and position, that they not only had one attorney but two, as the court will recall, and both of the attorneys discussed the case, and if that is ground for new trial, your Honor, then of course I have nothing to say, because there have been so many cases——

The Court: I am telling you why I would like to grant it, is all.

Mr. Green: There have been so many cases

where I, as counsel, have been unable to convince the court. If we could [35] get that set up as a precedent for granting a new trial, I am sure there are many cases I could get a new trial in, or, my clients could get a new trial, because I didn't adequately represent them.

The Court: I will have to work it out in the light of the mandate which came down, which simply dismissed the appeal, apparently because it was premature.

Mr. Green: What about the dismissal of the case against Farmers & Merchants, your Honor? Mr. Johnstone is here from the Farmers & Merchants and, certainly, is to have the case dismissed as against him, when we have stipulated to do so and the court has ordered to do so.

The Court: If I ordered it dismissed once, doesn't that do it?

Mr. Stephens: If your Honor please,——

Mr. Green: I would like to answer the court, if I may.

Mr. Stephens: May I say this, if your Honor please, now: I don't think it has been clearly presented at this time. Your Honor provided in the order, the minute order, "It is ordered that stipulation for dismissal as to defendant Farmers & Merchants Bank of Long Beach, signed by the court this date, be set aside and said dismissal not be filed."

Now, the effect, or, the law requires that for a dismissal to be effective—Rule 58—"The notation of a judgment in the civil docket as provided by

Rule 79(a) constitutes [36] the entry to judgment."

The same as to a dismissal. In other words, the dismissal must be entered. Your Honor ordered that the dismissal not be entered, and it has not been entered and it is not effective.

If I may suggest to the court that the judgment and the findings be set aside, as I have already argued, and then if they want to dismiss that party they are at liberty to do so. And I suggest that that is the proper way to proceed, in order to keep a clear record.

Mr. Green: There is no question of a clear record. They had a record they went on appeal with. The only question in this case is the one question, did they appeal properly? And apparently they didn't.

Now, at this time we move that the action as against the Farmers & Merchants Bank, that we stipulated to and that the court ordered dismissed, be dismissed and put in the record as dismissed, so there won't be any question about it.

The Court: All motions will be submitted.

Did you have something to add?

Mr. Johnstone: Your Honor, I think it has been pretty well argued. I had two observations to make.

The Court: Whom do you speak for?

Mr. Johnstone: Farmers & Merchants Bank. I am appearing for Walker & Horn. We, of course, want to see the dismissal [37] entered.

We have stipulated to it and I believe that for all purposes it is an effective dismissal. I think that it should be dismissed.

Your Honor, it would certainly clear up the record for the purposes of appeal. I have not heard any dispute between counsel on the facts as they were told to your Honor in the previous trial. I have no reason to believe that your decision would be any different if it were retried before you. Apparently, there are very small issues so far as facts are concerned. Certain things were done and pretty well agreed.

I wasn't here. I can only assume they were. This is a case where I believe two entirely different theories were stated in the complaint, but not separately stated.

I don't believe that the bank and the bonding company could both be responsible. It is a case, I feel, of necessity has to be severed. That is what evidently the upper court felt when they returned it, saying there was no compliance with Rule 54(b). They did not say it was not a proper case, they said there was no compliance, which merely takes a statement from your Honor there was no reason for delay and should be decided as to this one issue prior to a final determination.

I think that it has been made pretty clear by the plaintiff's counsel he wants to dismiss against the bank. The bank wants a dismissal entered. I beit is an effective dismissal, [38] if not by written stipulation, certainly by a retraction.

I think it would clear up the record, your Honor, by allowing us to have the case dismissed so that the bonding company and the plaintiff can argue this out on appeal.

Mr. Green: I want to say one more thing, if I may, your Honor. At the last hearing this is what the court said:—we have a transcript of it that Mr. Stephens ordered——

Mr. Stephens: I never got it. Your Honor please, I don't know——

Mr. Green: ——and we got a copy after they had ordered it.

"I anticipate that Mr. Green will present a dismissal again before the next hearing, and if he does I will grant it, unless you have answered and made it necessary for the consent of the bank to the entry of the dismissal by asking for some affirmative relief or something of that kind", which of course they have not done.

You said, "My only purpose in withdrawing the dismissal is to preserve the status quo, so Mr. Stephens will not be prejudiced on appeal by any action taken here today."

Mr. Stephens said that if you dismissed it, then the question for the time of his appeal might be prejudiced. [39] That is the only reason that the court said temporarily you would withhold it but would grant it at the next hearing.

The Court: Do you object to our dismissing it now?

Mr. Stephens: I have no objection to dismissing them, if we can first set aside the judgment and the findings.

Now, I want to make myself clear on that.

The Court: I can see your problem on that. But Mr. Green says I don't have jurisdiction to do that.

Mr. Stephens: I think Mr. Green is mistaken, if your Honor please, on it. And he hasn't cited any authority now. In other words, did this talk about my being responsible for the record and so forth, he is in error on that, because as far as the record, as to what went on with the Farmers & Merchants National Bank, it is all in the record, it was all printed. Show me if that is in error.

Mr. Green: I don't think you mean to make a misstatement to the court. Here is the record. It says here on page 95:

"Further discussion in regard to status and position of the Farmers & Merchants National Bank omitted at the request of counsel."

You didn't print that.

Mr. Stephens: I see what counsel has there, but that was all in the record; it wasn't printed. But it went up there as part of the transcript. [40]

Mr. Green: This is a transcript of the record, the printed thing, that is all the court concerns itself with.

The Court: That is what the court acts upon.

Mr. Stephens: That is what the court acts upon, that is correct.

Mr. Green: That wasn't in there.

Mr. Stephens: Here is the effect that Mr. Green wants to precipitate, your Honor please: If you grant the dismissal as to the Farmers & Merchants National Bank, it is Mr. Green's idea that at that point and immediately that a final judgment will then result from his dismissal, at which point, with-

out an opportunity to try this case again, we will have to then appeal on the record as it now is.

Now, I was going to call your Honor's attention to several things which have resulted in injustice in this trial, among other things, which is agreed in the reply brief of the appellees, that interest from June 1, 1949, to date of judgment was not proper.

And, as I pointed out very carefully in the opening brief, this has resulted in a judgment of $231.63 in excess of anything that has any support, except an error, an obvious error in the record.

Now, if your Honor please, I think those things should be corrected. If your Honor is disposed to enter a judgment correcting those things, and let us be for our appeal, I am [41] willing to do so. But it seems to me that when we have something that your Honor can seed out is erroneous, that no action should be taken by the court which would precipitate this.

Now, it might be that even if this dismissal were granted prior to the time that action was taken by the court, on the motion to set aside the judgment, it might be that the court could still set aside the judgment on a motion for a new trial or the like. But it seems to me we are duplicating and causing more difficulty, and your Honor has the jurisdiction and capacity and control over the case to do that in that order, and the Farmers & Merchants Bank would be properly represented. They have no interest whatsoever in the appeal or why or when we litigate the appeal. So I don't think their interests

are anything beyond getting dismissed. They could be dismissed just as well after your Honor has set aside the judgment as before.

Mr. Green: Your Honor, counsel points out this great mistake about $231.63. We admit it in the brief. There is no error that needs to be corrected. We admit in our briefs that there was an error in addition and that is corrected already.

Mr. Stephens: On the interest.

Mr. Green: Counsel wants to get a new trial—all he is talking about is he wants another crack at it. They have [42] had two chances already. There must be an end to litigation some place.

Because they make a mistake and don't make a proper appeal, they then come to the court and say, "Give us a new trial so we can make a proper appeal."

The case has been decided, your Honor, so far as these defendants are concerned. We are satisfied, as the litigants in this case, to take our chances in the Court of Appeals. We will be satisfied if the Court of Appeals will rule correctly on it and that will be the end of the litigation.

Either your Honor was right on these two occasions, when the case was presented to you by Mr. McCall and when it was presented again by Mr. Stephens, or your Honor was wrong and the court will decide it.

If we have to try it another time and the court again has to make a decision, they then will appeal again and we have got the same situation all over again.

And as far as the Farmers & Merchants are concerned, you see, the only grounds they make their motion on for a new trial is on the basis that since we have to try the case against the Farmers & Merchants anyhow, we should have to try it against them, too. We don't want to try the case against Farmers & Merchants. That case has been dismissed. This court told us at the last hearing he would file the dismissal at this time. And he gave counsel every chance [43] to come up with something new to date.

They haven't filed a single new case or anything else in this matter. It seems to me that a case that has once been tried, motion for new trial has been had, it has gone upon appeal on this record and they didn't perfect their appeal, that now the only thing before this court, I submit, or the action that this court should take is to dismiss as to the Farmers & Merchants Bank and then if the court wants to also make a nunc pro tunc order saying there is no reason for delay, then if counsel wants to appeal he can appeal.

I am pretty certain that the Court of Appeals will agree to hear the appeal on the same record or have it submitted on the arguments that have already been made and the briefs that have been filed, and then we will get a decision on this litigation. The American Seating Company furnished this material some four or five years ago to help build a naval station, and hasn't been paid.

I mean, if there ever was a case crying out for justice—I agree that the American Seating Com-

pany won't go broke if they don't get their money, but that is not the issue. The thing is here is a supplier of material who furnished this material and the bonding companies got their premiums for protecting a payment bond and performance bond they furnished, and yet, instead of paying, as your Honor said, I couldn't understand why there were any defenses to this case. [44] And certainly Mr. Stephens hasn't shown the court any defense to the case yet.

I submit this court should at this time have the clerk order this dismissal as to the Farmers & Merchants Bank, and then if Mr. Stephens has any rights to appeal let him go ahead and appeal. I am satisfied the Court of Appeals would sustain.

The Court: All motions are deemed submitted now.

Mr. Green: Thank you, your Honor.

Mr. Stephens: Thank you, your Honor.

Mr. Johnstone: I have one more thing to say, your Honor. It is kind of a practical problem with us. Representing the bank, I believe that the dismissal is effective and we have auditors that come and look at the books of the bank, and they want to know what is going to happen to this case. We have to carry it as a contingent liability.

I believe a dismissal is proper and should be entered. It appears to me that Mr. Stephens is using the dismissal to keep us in the case for purposes of his own, not because there is any liability, but solely to have a weapon over Mr. Green's head.

I suggest, your Honor, our dismissal should be

entered and we could at least inform our auditors at our bank that no longer the case is pending and we can write it off or take the contingent liability off the books. [45]

The Court: What the court has heretofore said stands.

(Whereupon, at 2:25 o'clock p.m., Monday, January 16, 1956, an adjournment was taken.)

Friday, April 6, 1956, 3:04 p.m.

The Court: Call the case, please.

The Clerk: 14,305, American Seating Company vs. Glens Falls Indemnity Company, et al.

Hearing on defendants' motion for relief pursuant to Rule 60, F.R.C.P.

Mr. Stephens: Your Honor please, I am the moving party. Should I proceed?

The Court: Let's see who this gentleman is.

Mr. Tankel: I am Frederick Tankel. I am appearing for Mr. Green and Mr. Essey. They are both otherwise engaged this afternoon.

The Court: All right. You might tell us just what you want, Mr. Stephens. I think everyone is interested in getting this case in such a state that the appellate court will actually go ahead and determine the question which you undertook to present to it before.

Mr. Stephens: I just talked to counsel, if your Honor please, and I think that as to most of the motion which I am about to make—although I would like to call your Honor's attention to it, so that it will be in the record, as to why I am mak-

ing this—I think that he would probably be willing to stipuate to a large portion of it, which leaves one point in dispute, which I am not going to argue at length. But if I [49] may, I would like to point to two or three places in the record that warrant the motion under Rule 60(b), probably subsections 1 and 2, and also under subsection 6, which is the last part of my motion, which will meet the dispute.

The judgment, if your Honor please, contained two erroneous parts to it, as far as the amount is concerned. One is as to the date that interest starts to run. Counsel for plaintiff concedes in his brief on appeal, and I believe that counsel who is here today will stipulate that that was an error.

It also contains, through typographical error, as pointed out in the opening brief of the appellate, that there is a sum of money in excess of two hundred dollars—the exact amount doesn't come to mind—which was in the body of the judgment, so that it will require, if a new judgment is to be entered it will require a reduction of the judgment by that particular amount and also a recomputation of interest.

The Court: Should we not then simply file and enter a corrected judgment, from which your appeal would be taken, substitute it——

Mr. Stephens: I believe that is correct, your Honor. I think for record that the minute order should show, one, that the nunc pro tunc order which was entered on March 30th is recalled and set aside.

And, No. 2, that the judgment itself is recalled and set [50] aside.

And, three, that a new judgment is ordered entered, corrected judgment. Then I believe that I will have a clear record and we will be able to proceed on appeal.

The Court: What do you make of it?

Mr. Tankel: We have no objection to the effect of the motion made by Mr. Stephens. However, we just feel that the order ex parte nunc pro tunc was just surplusage in this case, because the order became final on the entry of dismissal against Glens Falls, I believe was the last defendant, which was the final adjudication.

Mr. Stephens: That is also my view, your Honor. I think we are in agreement on that, and it would be appropriate, since it was surplusage, to recall it and strike it.

The Court: All right. So ordered.

Mr. Stephens: Now, that is as to the points I have already made, is that true, your Honor?

The Court: Yes.

Mr. Stephens: Now, there is one other point which I wanted to bring before the court's mind and I am not going to labor it.

For some reason—I don't know why, because I wasn't here at the time of the trial—this case got off to a very inauspicious start and has had an inauspicious course, I think, throughout. [51]

Due to the fact that the so-called stipulated statement of facts and records were really a combination of the statements of the two counsel, and also

of exhibits and interrogatories which were propounded by the plaintiff, it has been my view, after careful study of the case, that a number of the factual issues of the case have been obscured by simply the way that it has been brought up.

I have therefore tried earnestly and respectfully, in the best way that I could, on several occasions to urge the court to set aside, not only the judgment, but the findings of fact and conclusions of law, and set the case for trial and enable me to put to the plaintiff certain interrogatories, with which I had thereby hoped to clear up the record.

For example, it was argued in the brief on appeal of appellee's, which appears on page 25, the following statement:

"It was unnecessary for the trial court to make a special finding that the plaintiff offered to sell and supply said materials to E. F. Grandy, Inc., since the appellee did make an offer in its purchase order, which was approved by E. F. Grandy, Inc., and forwarded to the United States Naval Base."

Now, your Honor please, that statement is not supported by the record in any respect. I pointed that out on the briefs on appeal, and we will do that again if that is the course which I must take.

But I noted in the argument which was made to your Honor at the time the case was submitted, and in the memorandums on pretrial and the memorandums that were subsequently submitted to your Honor prior to decision, that that statement is constantly repeated. And I think counsel for appellee must think it is there, but I submit the record

doesn't show it and if I were to ask him for an admission as to that fact he would be compelled to admit that that is not true, which would point that out.

I am not now going to go over any other points. But there are several points that are similar to that.

I also was impressed by your Honor's statement, when we argued the motions, that have now been settled, on January 16, 1956, and the court said on page 34 of the transcript:

"What sticks in my mind, Mr. Green, is that when this case was presented the defendant Glens Falls was represented by an attorney who, as far as getting things over to me was concerned, just didn't get them over.

"The defense points, both as to the facts and as to the law, were such that I felt the man was just talking in circles, and I left the bench confused as to why he was defending the case. And since you had stated a good case for your client I granted judgment.

"Now, since then the attorney who presented a [53] confused defense here has been substituted out, and we have a very articulate man, and I would kind of like to hear the whole case properly presented by both sides, instead of only by your side."

Now, I was impressed by that, that your Honor felt in his own consciousness that the case had never really been presented, that your Honor had never had an opportunity to weigh those facts, un-

clouded by an already established judgment, findings of fact and conclusions of law.

Now, Mr. Green's argument up to now has been that I have had an opportunity to so argue the case and so present it. I earnestly represent to the court that I have not had such an opportunity.

It has been unfortunate, but I have always been compelled — and rightfully so — to address my remarks and my motions and the things that I urged the court to do, to the problem of setting aside those findings of fact and conclusions of law and the judgment, to enable me to get to that point.

Now, I believe if your Honor feels that way now he could set aside, under Rule 60(b), subsection 6, the judgment. The rule provides:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:" [54]

And then it lists six reasons.

No. 6 says: "Or any other reason justifying relief from the operation of the judgment."

And I submit to your Honor that that would be justifiable as a reason for relief in the operation of the judgment.

That is all I wish to say. If your Honor feels, as I think he may have indicated before, that he has decided the case and it should now go to the Ninth Circuit, and I appreciate counsel's willingness to stipulate to the order which your Honor has made with respect to correction of the judgment, and giving me an opportunity to appeal without the

question of the time within which I could appeal.

Thank you.

The Court: This court felt that the plaintiff had made out a case and that the matter having been submitted, the court having decided in favor of the plaintiff, that the fact that a defense might have been more expertly set forth is just a burden which defendants have along with the plaintiffs.

Parties who come into the court must get their cases properly presented at the trial, and there must be a finality to decisions, having once found—and I see no reason to think I was wrong—that there was liability here. Although there was an error in the computation, that has now been corrected by stipulation. [55]

I think I will deny your present motion, Mr. Stephens, and let the appellate court review the record which was made here in part by your predecessor who tried the case differently, I suppose, than you would try it.

But if we adopted some other rule it would mean that every time a lawyer adopts a trial method and selects and rejects the matters which he will bring before the court and makes the wrong choices, that a litigant could then go out and get more expert counsel, come in and get a new trial.

So I deny the present motion.

Mr. Stephens: May I ask the court as to the time for preparation of this new order. Perhaps counsel and I could do so quickly.

Are you planning to leave for Sacramento tomorrow?

The Court: I am planning to leave for Sacramento on Sunday. But the order, which I take it from the way you have been getting along now, will be one that you will be able to agree to as to form,——

Mr. Stephens: I think we could.

The Court: ——and it can be quickly sent to Sacramento, and I would sign it there so it could be promptly entered. I think this case should get on.

Mr. Stephens: I do, too. I am concerned about that, your Honor.

Perhaps we can compute the interest. I think that is the [56] only problem. And use the same form of judgment, I assume, because it is counsel's choice as to judgment, of course.

The Court: If you wish, you may come back to chambers and my secretary can help you. You can get it reduced to form so it might be signed today and entered immediately, if you are in position to do that.

Mr. Tankel: I would hesitate to do that right now, your Honor. I would like to have Mr. Green and Mr. Essey see it. I am a kind of a last-minute substitution here.

The Court: Bearing in mind the case from the plaintiff's standpoint, it has been Mr. Green's responsibility——

Mr. Stephens: I agree.

The Court: ——perhaps you had better work it out either tomorrow or Monday. And if you bring it in, leave it with our clerk and he will immediately

forward it to the District where I will be sitting, and it will be given immediate attention.

Mr. Stephens: Thank you, your Honor.

Mr. Tankel: Thank you very much, your Honor.

(Whereupon, at 3:25 o'clock p.m., Friday, April 6, 1956, an adjournment was taken.)

[Endorsed]: Filed May 1, 1956.

[Endorsed]: No. 15,164. United States Court of Appeals for the Ninth Circuit. Glens Falls Indemnity Company, a corporation, and E. F. Grandy, Inc., a corporation, Appellants, vs. American Seating Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: May 25, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,258

GLENS FALLS INDEMNITY COMPANY, a New York corporation, and E. F. GRANDY, INC., a California corporation,

Appellants,

vs.

AMERICAN SEATING COMPANY, a New Jersey Corporation, Appellee.

SUPPLEMENTAL DESIGNATION OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL AND DESIGNATION OF THE RECORD WHICH IS MATERIAL TO CONSIDERATION OF APPEAL

Pursuant to Rules of the United States Court of Appeals for the Ninth Circuit, Rule 17, Appellants herein make a concise statement of the points on which Appellants intend to rely and designate the record which is material to the consideration of the appeal.

Points on Which Appellants Intend to Rely

1. Appellants intend to rely upon all of the points designated in the Transcript of Record heretofore printed in this case, pages 178 to 187, inclusive.

2. Appellants intend to rely upon the further point that the trial court committed reversible error in denying motion made by Appellants in the trial

court under Federal Rule of Civil Procedure 60(b)(6).

Designation of the Record Which Is Material To Consideration Of Appeal

Appellants have filed with the Clerk of the District Court their designation of record to be transmitted to the Court of Appeals. Such designation was made pursuant to Federal Rules of Civil Procedure, Rule 75, and included the whole record because it is the position of Appellants that nowhere in the record is there a foundation for certain findings. It is therefore necessary that the whole record be available to the Court of Appeals.

However, this Designation of the Record Which is Material to Consideration of Appeal is intended to include only such portions of the record which Appellants believe may be reasonably expected to be referred to in the briefs. Accordingly, Appellants respectfully request that the portions of the record heretofore designated in the Designation of the Record Which is Material to Consideration of Appeal originally filed in this action be the portion of said record which Appellants designate to be printed and that in addition thereto, the following record be printed:

Reference to page is reference to page number of the record on appeal as certified by the Clerk of the District Court.

1. Mandate of the Court of Appeals for the Ninth Circuit filed December 13, 1955. Page 216.

2. Motion to Set Aside Judgment, Findings of

Fact and Conclusions of Law and to Set Case for Trial, Statement of Reasons in Support Thereof, Points and Authorities and Notice of Motion (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated September 29, 1955 and filed September 30, 1955. Page 198.

3. Notice of Motion to Amend Judgment Nunc Pro Tunc, Statement of Reasons in Support Thereof and Points and Authorities (filed by plaintiff) dated October 18, 1955 and filed October 24, 1955. Page 206.

4. Minute Order dated October 14, 1955 continuing hearing on motions, to October 31, 1955. Page 205.

5. Substitution of Attorneys, substituting Burnett L. Essey and Irving H. Green as attorneys of record for plaintiff instead of Wolfson & Essey and Irving H. Green dated October 21, 1955, filed October 24, 1955. Page 212.

6. Minute order dated October 31, 1955. Page 215.

7. Stipulation for Dismissal of Farmers & Merchants Bank of Long Beach, dated October 31, 1955, and Order thereon dated October 31, 1955, filed and docketed March 23, 1956. Page 218.

8. Minute Order dated January 16, 1956. Page 217.

9. Nunc Pro Tunc Order Amending Judgment of June 9, 1953, filed and docketed March 30, 1956. Page 196, 220.

10. Notice of Entering Nunc Pro Tunc Order. Page 197.

11. Motion for Relief Pursuant to F.R.C.P. 60, Statement of Reasons in Support Thereof, Points and Authorities and Notice of Motion and Order Shortening Time (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated April 3, 1956, filed April 4, 1956. Page 221.

12. Ex Parte Motion for Stay of Execution Pursuant to F.R.C.P. Rule 62(b) (filed by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.) dated April 3, 1956, and Order thereon, filed and docketed April 4, 1956. Page 229.

13. Notice dated April 4, 1956 that Order for Stay of Execution of Judgment docketed and entered April 4, 1956. Page 230.

14. Minute Order dated April 6, 1956. Page 231.

15. Judgment dated April 17, 1956 and entered April 18, 1956. Page 232.

16. Notice dated April 18, 1956 that Judgment docketed and entered April 18, 1956. Page 234.

17. Notice of Appeal by Glens Falls Indemnity Company and E. F. Grandy, Inc., dated April 19, 1956, filed April 20, 1956. Page 235.

18. Supersedeas Bond of Glens Falls Indemnity Company dated April 20, 1956 and filed April 20, 1956. Page 237.

19. Ex Parte Application to File Supersedeas Bond dated April 23, 1956 and Order thereon, all filed April 23, 1956. Page 241.

20. Supersedeas Bond of E. F. Grandy, Inc., filed April 23, 1956. Page 243.

21. Designation of Record on Appeal. Page 247.

22. Reporter's Trancript of Proceedings, October 31, 1955.

23. Reporter's Transcript of Proceedings, January 16, 1956.

24. Reporter's Transcript of Proceedings, April 6, 1956.

It is the intention of Appellants and Appellants do hereby respectfully request that the original printed Transcript of Record on Appeal be used and that in addition thereto there be printed a supplemental Transcript of Record on Appeal consisting of all of the portions of the Record hereinabove designated, which portions have not already been printed.

Dated: May 28, 1956.

Respectfully submitted,

JOHN E. McCALL and
ALBERT LEE STEPHENS, JR.,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorneys for Appellants

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 2, 1956. Paul P. O'Brien, Clerk.